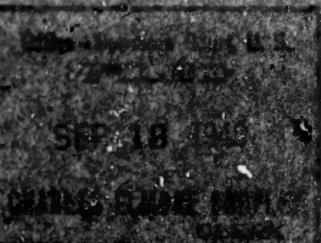


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FILE CO.



No. 877

United States Court of the United States

Concord, New Hampshire

RICHARD E. BOYD, Clerk of Court

UNITED STATES OF AMERICA

OR APPLICANT FOR A WAVE OF INFORMATION TO THE UNITED STATES GOVERNMENT CONCERNING THE APPRAISAL OF THE PROPERTY

WILLIAM T. COOPER, Chairman of the Board of Directors

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 377

HIRAM R. EDWARDS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE TENTH
CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 72-76), is reported in 113 F. (2d) 286.

JURISDICTION

The judgment sought to be reviewed was entered June 29, 1940 (R. 76-77). A petition for rehearing (R. 79-81) was denied July 22, 1940 (R. 82). The petition for writ of certiorari was filed August 26, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See

also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

The principal questions presented are:

- (1) Whether the trial court erred in overruling petitioner's "plea in bar and application for production of transcript of evidence."
- (2) Whether the Circuit Court of Appeals committed reversible error in holding that the conspiracy count supported the three-year sentence imposed upon the petitioner.

STATUTES INVOLVED

These, as well as the pertinent provisions of the Rules of Practice of the Securities and Exchange Commission, are included in the Appendix (*infra*, pp. 11-14).

STATEMENT

An indictment in eleven courts was returned against the petitioner and another in the District Court for the Western District of Oklahoma. The first two counts charged violations of Section 17(a)(1) of the Securities Act of 1933; the third a violation of Section 17(a)(2) of the Securities Act; the fourth and fifth, violations of Sections 5(a)(1) and (2), respectively, of the Securities Act; six to ten, violations of the Mail Fraud Statute, and the eleventh a conspiracy to violate the Mail Fraud Statute and the Securities Act (R. 5-

40). The indictment dealt generally with the formation of certain business trusts in Oklahoma for the production of oil and the issuance, sale, and delivery of units or certificates of beneficial interest in such trusts under false and misleading statements.

After the overruling (R. 49-50) of a demurrer (R. 41-42) and a "Plea in Bar and Application for Production of Transcript of Evidence" (R. 43-46), the petitioner withdrew his plea of not guilty, entered a plea of *nolo contendere* to each count of the indictment (R. 50), and was sentenced to three years on each count, the sentences to run concurrently (R. 50-51).

Upon appeal to the Circuit Court of Appeals for the Tenth Circuit, the judgment of the trial court was unanimously affirmed (R. 73-77) and a petition for rehearing denied (R. 79-82).

ARGUMENT

I

The petitioner contends that the trial court improperly overruled his "plea in bar and application for production of transcript of evidence" (Br. 16-23).

The plea in bar (R. 43-45) alleged that the petitioner had obtained immunity under Section 22 (c) of the Securities Act of 1933¹ because he was compelled, after a claim of privilege, to testify under

¹ Copied in petitioner's brief at page 20.

oath at proceedings conducted by representatives of the Securities and Exchange Commission as to matters which were a part of the subject matter of the subsequent prosecution. Included in this plea were an application that the trial court order the Government's representatives to produce and submit to the petitioner, upon payment of the cost thereof, a copy of the transcript of petitioner's testimony at such proceedings and prayers that the petitioner be heard on the merits of his plea, that the indictment be dismissed, and that the petitioner be discharged. Attached to the plea and application was a letter of the Assistant General Counsel of the Securities and Exchange Commission refusing to furnish a transcript of the testimony in question (R. 45-46). The Government filed a motion to strike the plea in bar and an objection to the production of the transcript (R. 46-47), in which the Government challenged the sufficiency of the plea and contested its allegations by denying that the petitioner obtained immunity. In support of its motion the Government filed therewith an affidavit of an officer of the Securities and Exchange Commission who was present at the proceedings heretofore mentioned, in which it was averred that the petitioner was not at any time sworn or placed under oath and was not at any time compelled to testify or give any information against himself or anyone else under oath or otherwise, and that the proceedings men-

tioned in his plea were recessed upon petitioner's claim of privilege (R. 47-49). While the petitioner moved to strike this affidavit as incompetent (R. 49), he did not controvert the truth of its averments nor those contained in the Government's motion to strike his plea. Both motions to strike, as well as the petitioner's plea in bar and application for the production of the transcript of testimony, were overruled (R. 49-50).

The rules of the Securities and Exchange Commission permit the furnishing to parties only of transcripts of "hearings" and not of "investigations" under the Securities Act of 1933, as amended (Rules IV and XVI, Appendix, *infra*, pp. 13-14). That these rules are fully justified by the statute and are reasonable in character has been recognized in *Woolley v. United States*, 97 F. (2d) 258, 262 (C. C. A. 9th), certiorari denied, 305 U. S. 614; *In re Securities and Exchange Commission*, 14 F. Supp. 417 (S. D. N. Y.),² affirmed 84 F. (2d) 316 (C. C. A. 2d), reversed on ground case was

² In this case it was said by the District Court (p. 418): "The hearing referred to in the Securities Exchange Act and in the rules of the Commission is a proceeding of relative formality, generally public, with definite issues of fact or of law to be tried, in which the parties proceeded against have a right to be heard. It is much the same as a trial. It may terminate in a final order. An investigation, on the other hand, is informal, preliminary, and usually private. It is conducted to determine whether grounds exist for taking more formal proceedings. There are no parties in any substantial sense, no definite issues. There is no right to be heard."

moot, 299 U. S. 504; *Securities and Exchange Commission v. Torr*, 15 F. Supp. 144 (S. D. N. Y.); and *United States v. Mascuch*, 30 F. Supp. 976 (S. D. N. Y.).³

The petitioner was consequently not entitled to a transcript of the proceedings before the Commission unless these proceedings were in the course of a "hearing" rather than during an "investigation." The plea in bar characterized the proceedings both as an "investigation" and as "hearings" (R. 44). The proceedings may well have been proceedings during the course of an investigation; petitioner made no definite showing that the proceedings took place during a hearing. In the absence of such a showing the court was justified in refusing his application for the production of a transcript.

The burden was, of course, upon the petitioner to establish the allegations of his plea in bar that he was compelled, after his claim of privilege, to testify under oath at the proceedings before the officers of the Securities and Exchange Commission. *Kastel v. United States*, 23 F. (2d) 156, 157 (C. C. A. 2d), certiorari denied, 277 U. S. 604; *United States v. Giles*, 19 F. Supp. 1009 (Okla.); see also *Lee v. United States*, 91 F. (2d) 326, 329 (C. C. A. 5th), certiorari denied, 302 U. S. 745. The Government had controverted these allega-

³ A review of this decision is not sought in the petition for writ of certiorari now pending in the *Mascuch* case (No. 116, present Term).

tions by its motion to strike and by the affidavit annexed thereto of an officer of the Securities and Exchange Commission who was present at the proceedings. It therefore became incumbent upon the petitioner to introduce proof in support of the allegations of his plea, but the record is barren of such proof. Neither is there any showing in the record that the petitioner was denied any opportunity to adduce proof. Notwithstanding the fact that the attorney who represented the petitioner in the criminal trial was the attorney who appeared with him at the proceedings in question, the petitioner neither produced an affidavit of this attorney nor sought permission to have him testify. Likewise the record does not disclose that subpoenas were requested to secure the attendance of those officials of the Securities and Exchange Commission who were present at the proceedings. Since the petitioner failed to sustain the burden which rested upon him, his plea was, we submit, properly overruled.

The petitioner also contends (Br. 33-36) that the Circuit Court of Appeals erred in receiving in evidence, over his objection, an affidavit of an Assistant United States Attorney and the annexed transcript of the proceedings before the Commission (R. 55-72). He argues that the Circuit Court of Appeals was precluded from considering this affidavit and transcript because it was not a part of the record on appeal. Suffice it to say that there is nothing in the opinion of the

Circuit Court of Appeals which indicates that that court in anywise predicated its decision upon this affidavit and transcript. Indeed, if the court had relied upon the affidavit and transcript, it would not have decided merely that the petitioner had failed to establish the allegations of his plea in bar but that those allegations were contrary to the facts, since the transcript itself (R. 56-72) conclusively establishes that the petitioner was not compelled to testify before the Commission under oath or otherwise, after his claim of privilege, but was excused from testifying upon the assertion of his constitutional privilege. The court would likewise, of necessity, have also held that the proceedings in question were proceedings during the course of an investigation rather than a hearing.

II

Petitioner also contends that the Circuit Court of Appeals committed reversible error in holding that the three-year sentence imposed upon him was sustainable upon the basis of the conspiracy count, since the statute upon which that count was predicated permits a maximum of only two years' imprisonment (Appendix, *infra*, p. 11). We submit that this error does not require the remanding of the case to the Circuit Court of Appeals.

The opinion of the Circuit Court of Appeals points out (R. 75) that the conspiracy count "was attacked on the single ground of failure to charge that the securities were not of the class exempted

under section 3 of the Securities Act, as amended" (Appendix, *infra*, pp. 12-13). The Court answered that attack by stating (R. 75):

* * * It is clear from the face of the count that the securities described therein do not come within the classes described in the statute. Ordinarily an exception created by a proviso or other distinct or substantive clause of a criminal statute need not be negatived in an indictment. One relying upon such an exception must set it up and establish it. *Ledbetter v. United States*, 170 U. S. 606; *McKelvey v. United States*, 260 U. S. 353; *Nicoli v. Briggs*, 83 F. (2d) 375; *Knight v. Hudspeth*, (10th) 112 F. (2d) 137, decided May 20, 1940. And an indictment charging a conspiracy to violate a statute need not negative an exception contained in such statute either by proviso or other distinct or substantive provision. *Manning v. United States*, 275 F. 29. * * *

The cases upon which the court relies clearly support its view.*

Since the only ground of attack which the petitioner specifically makes against counts 4 and 5,

* The cases under the Harrison Narcotic Act which petitioner cites are clearly not in point. Those cases hold that under that Act it is not sufficient merely to charge that the accused possessed narcotics; that it must also be alleged that he was a person who was required under the statute to register. The indictment in the instant case did not merely allege a sale of securities but a sale without registration. The Harrison Act specifically provides (U. S. C. Title 28, Sections 1387-1388 (c)), in accordance with the well recognized rule applied by the court in the instant case, that the indictment need not negative the statutory exemptions.

which counts would support the three-year sentence,⁵ is the same which he levelled at the conspiracy count (Br. 26-29), the court necessarily would have made the same holding if it had selected either of those counts instead of the conspiracy count. Petitioner consequently was in nowise prejudiced by the error of the Circuit Court of Appeals and the remanding of the case would serve no useful purpose.⁶

CONCLUSION

The case was correctly decided below. There exists no conflict of decisions and there is involved no important question of Federal law. We therefore respectfully submit that the petition for writ of certiorari should be denied.

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Solicitor General.

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Attorneys.

SEPTEMBER 1940.

⁵ See Section 24 of the Securities Act (Appendix, *infra*, p. 13.)

⁶ While the petition contends generally that the indictment did not indicate that it was signed by the foreman of the grand jury, and, therefore, was defective, the lack of merit in this contention is amply demonstrated by the opinion of the Circuit Court of Appeals (R. 76).

APPENDIX

STATUTES AND RULES INVOLVED

Section 37 of the Criminal Code (U. S. C., Title 18, Sec. 88):

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000, or imprisoned not more than two years, or both.

Section 215 of the Criminal Code (U. S. C., Title 18, Sec. 338):

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement * * * in any post office, or station thereof * * * to be sent or delivered by the post-office establishment of the United States * * * shall be fined not more than \$1,000, or imprisoned not more than five years, or both.

Section 17 (a) of the Securities Act of 1933
(U. S. C., Title 15, Sec. 77q):

(a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or * * *

* * * * *
Section 5 (a) of the Securities Act of 1933, as amended (U. S. C., Title 15, Sec. 77e):

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

* * * * *
Section 3 of the Securities Act of 1933, as amended (U. S. C., Title 15, Sec. 77c) so far as pertinent,

(a) Except as hereinafter expressly provided, the provisions of this sub-chapter

shall not apply to any of the following classes of securities;

(Then follows the various classes of securities which are exempt.)

Section 24 of the Securities Act of 1933 (U. S. C., Title 15, Sec. 77x):

Any person who willfully violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than \$5,000 or imprisoned not more than five years, or both.

Rule IV¹ of the Rules of Practice promulgated by the Securities and Exchange Commission:

* * * * *

(c) Hearings shall be stenographically reported and a transcript thereof shall be made which shall be a part of the record of the proceeding. Transcripts will be supplied to the parties by the official reporter at such rates as may be fixed by contract between the Commission and the reporter.

Rule XVI² of the Rules of Practice promulgated by the Securities and Exchange Commission:

¹ Rule IV of the Rules of Practice, as amended November 4, 1936, is now contained in substance in Rule V (c) of the Rules of Practice, as amended December 1, 1939.

² Rule XVI of the Rules of Practice, as amended November 4, 1936, is now contained in substance in Rule XIX of the Rules of Practice, as amended December 1, 1939.

These Rules shall not be applicable to investigations conducted by the Commission pursuant to Sections 8 (e), 19 (b), and 20 (a) of the Securities Act of 1933, as amended; Sections 21 (a) and 21 (b) of the Securities Exchange Act of 1934, as amended; or Sections 11 (a), 13 (g), 18 (a), 18 (b), 18 (c), and 30 of the Public Utility Holding Company Act of 1935.

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